Penn State International Law Review

Volume 28
Number 2 *Penn State International Law Review*

Article 3

9-1-2009

Application of International Humanitarian Law by United States Courts

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INTRODUCTION

On September 18, 2001, the United States Congress adopted a joint resolution authorizing the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the terrorist attacks that killed nearly 3,000 people in New York City, Washington, D.C., and rural Pennsylvania a week earlier.[1] Acting pursuant to this authorization, United States military forces initiated combat operations in Afghanistan in October 2001.[2] These operations were directed against both the al

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1. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

2. *See* David Rhode and Norimitsu Onishi, *A Nation Challenged: Last Stronghold; Taliban Abandon Last Stronghold; Omar is Not Found*, N.Y. TIMES, Dec. 8, 2001, at A1.

Qaeda terrorist network and Afghanistan's Taliban government, which, in the determination of the President, had supported al Qaeda.[3]

During the course of these operations, scores of individuals were captured by American and allied forces and initially detained in Afghanistan.[4] In early 2002, the United States began transferring detainees to a naval base at Guantánamo Bay, Cuba.[5] Identified as al Qaeda and Taliban prisoners, these detainees were neither recognized as prisoners of war, nor were charged with any crime.[6] Military law experts suggested that the reason the Bush Administration chose Guantánamo Bay was to set up an argument that United States civilian courts lacked jurisdiction over the detainees since the facility is located on territory leased from Cuba.[7]

The United States government announced that detainees would be tried before military commissions established by the President.[8] Such tribunals had last been utilized sixty years earlier, following World War II.[9] In the face of expansive executive powers and the legal uncertainties regarding their status, detainees began mounting legal challenges to their detention and to trial by a military commission.[10] In addition to arguments based on domestic law, the detainees raised arguments invoking international law, particularly by claiming individual rights under international humanitarian law.[11]

While claims based on international humanitarian law are not foreign to United States Supreme Court jurisprudence, they are relatively rare. Most Supreme Court cases addressing international humanitarian law predate the extensive codification of that body of law in the 1949 Geneva Conventions.[12] The Guantánamo Bay detainee cases have

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3. *See* George W. Bush, President of the U.S., Address to Joint Session of Congress (Sept. 20, 2001), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html.

4. *See* Steven Lee Myers, *A Nation Challenged: In the South; Anticipating Many Captives, U.S. Marines Build a Prison Camp at Kandahar Airport*, N.Y. TIMES, Dec. 16, 2001, at 1B.

5. *See* Steve Vogel, *Afghan Prisoners Going to Gray Area: Military Unsure What Follows Transfer to U.S. Base in Cuba*, WASH. POST, Jan. 9, 2002, at A1.

6. *See id.*

7. *See id.*

8. *See* Katharine Seelye, *A Nation Challenged: Military Tribunals; Government Sets Rules for Military on War Tribunals*, N.Y. TIMES, Mar. 20, 2002, at A1. *See also* Military Order—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

9. *See id.*

10. *See infra* Parts III-IV.

11. *See id.*

12. Before 2000, only two United States Supreme Court cases referred to the 1949 Geneva Conventions, both in the context of juvenile executions. *See* Stanford v. Kentucky, 492 U.S. 361 (1989); Thompson v. Oklahoma, 487 U.S. 815 (1988).

provided one of the few situations in which federal courts have consistently been faced with claims that international humanitarian law grants individual rights. Thus, the detainee cases provide an important illustration of how the American federal courts have interpreted and applied international humanitarian law guarantees.

This article will examine the application and enforcement of international humanitarian law by the United States federal courts. Part I begins with a look at the status of international law in American law; particularly the legal effect of treaties. Part II reviews the Supreme Court's past international humanitarian law decisions. The limits presented by domestic law and international human rights law, in the detainee cases, will be addressed in Part III. Part IV examines how international humanitarian law has been applied in the Supreme Court's Guantánamo Bay detainee cases. Finally, Part V considers the status of international humanitarian law in federal jurisprudence and prospects for its future use to guarantee individuals rights.

I. INTERNATIONAL LAW AS AMERICAN LAW

In order to appreciate the application of international humanitarian law in the United States courts, it is important to understand the place of international law in the American legal system. It is also critical to examine the manner in which courts have applied those international provisions, which guarantee individual rights.

"International law is part of our law" declared the United States Supreme Court over a century ago.[13] The United States Constitution specifies that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ."[14] This unequivocal statement incorporates into federal law all conventional law to which the United States is a party. The Constitution requires individual states to respect treaty law, and invalidates any state law to the contrary.[15]

The body of international law incorporated into American law goes beyond that contained in treaties, known as conventional international law. The common law inherited by the United States from England also included customary international law,[16] which is based on state

13. The Paquette Habana, 175 U.S. 677, 700 (1900) (applying international law to determine that coastal fishing vessels captured off Cuba are not subject to confiscation as prizes of war).

14. U.S. CONST. art. VI.

15. *See id.*

16. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S., pt. 1, ch. 2, intro. note (1987).

practice.[17] While not expressly mentioned in the Constitution like conventional international law, the Supreme Court has made clear that customary international law is equally a part of federal law.[18] Thus, it may be invoked once its existence is established.

It would seem to follow that international law, whether conventional or customary, may be relied on in American courts to the same extent and with the same effect as domestic law. However, this is often not the case under a principle known as "non-self-execution."[19] This judicial hurdle routinely serves as a bar to the use of conventional international law in American courts.[20]

The non-self-execution doctrine holds that a treaty does not create individually enforceable rights unless it is found to be self-executing.[21] In an 1829 case, the Supreme Court found that a treaty between Spain and the United States could not be judicially enforced because it did not create present rights, but only obligated Congress to take future action.[22] Thus, the treaty was not "self-executing" because it required implementing legislation.

The non-self execution doctrine has generated controversy because, over time, a presumption against self-execution arose in the federal courts' application of the doctrine. The Supreme Court recently underscored this presumption, citing a lower court for the proposition that while treaties "may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms."[23] Commentators have noted that federal courts employ "generalized intent inquiries" to determine whether Congress intended enforceability.[24]

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17. BLACK'S LAW DICTIONARY 835 (8th ed. 2004).

18. *See Paquette Habana,* 175 U.S. at 700. The Court in *Paquette Habana* explained that "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations." *Id.*

19. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S., pt. 1, ch. 2, § 111(4) (1987).

20. Aya Gruber, *Who's Afraid of Geneva Law?*, 39 ARIZ. ST. L.J. 1017, 1017 (2007).

21. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S., pt. 1, ch. 2, § 111(4) (1987).

22. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 254 (1829).

23. Medellin v. Texas, 128 S. Ct. 1346, 1356 (2008) (quoting Igartúa-De La Rosa v. United States, 417 F.3d 145, 150 (2005)). The American Law Institute's restatement reads that a treaty is non-self-executing if it manifests an intention that it not be effective without implementing legislation or if Congress requires implementing legislation. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 111(4) (1987).

24. Gruber, *supra* note 20, at 1050. Gruber argues the presumption of non-self-execution is the result of unchecked lower-court activism and reveals isolationist influences. *Id.*

Under this interpretation of the non-self execution doctrine, an individual seeking to rely on a treaty provision has been required to demonstrate that Congress intended for provisions of a treaty to be judicially enforceable.[25] Right or wrong, this interpretation has acted as an impediment to individuals attempting to invoke international conventional law in American courts.[26] In the words of one scholar, the doctrine has served as "an impenetrable barrier" to the enforcement of treaty rights by individuals in the federal courts.[27] Thus, while the Supreme Court has occasionally considered guarantees of individual rights contained in conventional international law to assist in its interpretation of domestic law,[28] such rights have not been successfully invoked on behalf of individuals in the federal courts.[29]

II. THE SUPREME COURT'S PAST LAW OF WAR CASES

The use of international law by the United States Supreme Court has included reliance on international humanitarian law. The Court recognized the existence of the common law of war early in the nation's history.[30] At the dawn of the 19th century, the Court observed that the authorization of hostilities by Congress causes "the general laws of war to apply to [the] situation."[31]

The Court's earliest law of war cases involved the capture of ships on the high seas. The customary law of war was the controlling law governing the forfeiture of ships and condemnation of cargo. The Court repeatedly applied the law of war to prize cases from its early days

25. *See id.*
26. *See id.* at 1019.
27. *See id.*
28. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 575-79 (2005) (a case involving juvenile death penalty).
29. *See, e.g., Medellin*, 128 S.Ct. at 1356 (stating that the judgment of International Court of Justice regarding Vienna Convention is non-self-executing); Pierre v. Gonzales, 502 F.3d 109, 119-20 (2nd Cir. 2007) (stating that the U.N. Convention Against Torture is non-self-executing); Singh v. Ashcroft, 398 F.3d 396, 404, n. 3 (6th Cir. 2005) (stating that the U.N. Convention Against Torture is non-self-executing); Beazley v. Johnson, 242 F.3d 248, 267 (5th Cir. 2001) (stating that the International Covenant on Civil and Political Rights is non-self-executing).
30. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 279 (1796).
31. Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801).

through the War of 1812,[32] the U.S. Civil War,[33] and the Spanish-American War.[34]

The Court's use of this body of law increased as it was forced to apply the law of war to a wider range of property claims as a result of military campaigns during the 19th century. The destruction or confiscation of property by military forces was frequently justified or nullified based on the customary law of war.[35]

The United States' Civil War presented more challenging questions about the scope of military authority and the law of occupation. The Court again turned to the customary law of war for guidance in these cases. In *New Orleans v. The Steamship Company*[36] the Court observed that under the law of war, the conquering power has the right to displace the previous authority and exercise all necessary functions of government.[37]

In one line of cases, the Court addressed the military's authority to establish courts with jurisdiction over civilian matters. In *Mechanics' and Traders' Bank v. Union Bank*,[38] the Court noted that the law of war permits, by necessity, the establishment of military courts in occupied territory.[39] However, the law of war superseded statutory and constitutional law only in the rebellious states. Thus, in *Ex parte*

32. *See generally* The Caledonian, 17 U.S. (4 Wheat.) 100 (1819) (holding that an American ship trading with the enemy was subject to capture and forfeit).

33. *See generally* The Hampton, 72 U.S. (5 Wall.) 372 (1867) (holding that the statute was not intended to supplant law of war regarding capture of ship); The Prize Cases, 67 U.S. (2 Black) 635 (1863) (stating that the law of war justifies the capture of ships in service of enemy).

34. *See generally Paquette Habana*, 175 U.S. 677 (stating that coastal fishing vessels are exempt from capture under the law of war); The Benito Estenger, 176 U.S. 568 (1900) (applying the law of capture to a ship).

35. *See generally* Herrera v. United States, 222 U.S. 558 (1912) (applying law of war and permitting seizure of vessel for military use despite surrender of Cuba); Juragua Iron Co. v. United States, 212 U.S. 297 (1909) (stating that the destruction of an American factory in Cuba was justified by law of war); Ford v. Surget, 97 U.S. 594 (1878) (stating that law of war prevents claim against Confederate commander's destruction of cotton to prevent its seizure by Federal forces); Titus v. United States, 87 U.S. (20 Wall.) 475 (1874) (holding that public property of enemy becomes conqueror's property); Miller v. United States, 78 U.S. (11 Wall.) 268 (1871) (holding that enemy property is subject to condemnation under laws of war); United States v. Reading, 59 U.S. (18 How.) 1 (1856) (stating that an individual enlisting in U.S. Army does not forfeit property in enemy territory); United State v. Guillem, 52 U.S. (11 How.) 47 (1851) (strictly construing the law of war in prohibiting the confiscation of personal property of a neutral citizen on an enemy ship).

36. *See* New Orleans v. The Steamship Co., 87 U.S. (20 Wall.) 387 (1874).

37. *See id.* at 394.

38. *See* Mechanics' and Traders' Bank v. Union Bank, 89 U.S. (22 Wall.) 276 (1874).

39. *See id.* at 295-96.

Milligan,[40] the Court held that military courts had no jurisdiction over a civilian in a loyal state where the civilian courts remained open.[41]

The Court has also addressed the power of the military to try its own personnel. *Coleman v. Tennessee*[42] held that under the customary law of war a court martial possesses jurisdiction to try a soldier of its own army in occupied territory.[43] The Court confirmed that those military offenses not covered by statute are punishable under the law of war.[44] The Court also relied on the law of war for the proposition that military personnel are not subject to civil jurisdiction in enemy territory.[45]

The Court's use of the law of war expanded again during World War II. Previously, the Court had applied the customary law of war. Now, the Court was presented with its first opportunities to consider conventional humanitarian law. In addition, in its review of prosecutions for war crimes, the Court would encounter assertions of individual rights grounded in international humanitarian law.

In *Ex parte Quirin*,[46] eight German-born residents of the United States challenged their trial for war crimes by a military commission.[47] The Court found that Congress had the authority to establish military commissions to try violations of the law of war, and validly incorporated the law of war into the legislation.[48] The Court referred to the Hague Regulations[49] and to customary law to conclude that the petitioners failure to wear "fixed and distinctive emblems" when entering the country surreptitiously to commit hostile acts rendered them "unlawful belligerents" in violation of the law of war.[50] As such, the eight German-born residents were properly tried before military commissions.[51]

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40. *See Ex Parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).
41. *See id.* at 123.
42. *See* Coleman v. Tennessee, 97 U.S. 509 (1879).
43. *See id.* at 517.
44. *See Ex parte* Vallandingham, 68 U.S. (1 Wall.) 243, 249 (1863).
45. *See* Dow v. Johnson, 100 U.S. 158, 170 (1879).
46. *See Ex parte* Quirin, 317 U.S. 1 (1942).
47. *See id.* at 18-19.
48. *See id.* at 30-31.
49. *See* Hague Convention (IV) Respecting the Laws and Customs of War on Land, annex, Oct. 18, 1907, U.S.T.S. 539 (entered into force Jan. 26, 1910).
50. *Quirin*, 317 U.S. at 34-35.
51. *See id.* at 41-46. The Court added this disclaimer: "We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war." *Id.* at 45-46. *See also* Madsen v. Kinsella, 343 U.S. 341 (1952) (stating the law of war justified trial by military commission for a spouse of service member in Germany).

In *In re Yamashita*[52] and *Johnson v. Eisentrager,*[53] petitioners accused of violations of the law of war challenged their trial by military commission. These cases marked the Court's most extensive engagement with conventional humanitarian law, although it only constituted a small portion of each opinion.[54] First, the Court referred to the Hague Regulations to find that petitioners had been accused of recognized war crimes.[55] Second, among many other arguments, the Court considered challenges to the validity of the military commission proceedings based on the Geneva Convention of 1929.[56]

Both Yamashita, a Japanese general, and the *Eisentrager* petitioners invoked the same two Geneva Convention articles.[57] The first article required notification of the protecting power before judicial proceedings against a prisoner of war,[58] while the second specified that "sentence shall only be pronounced on a prisoner of war by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power."[59]

The Court rejected the argument in both cases, finding that the specified articles only applied to trial for infractions committed while a prisoner of war, and not to trial for war crimes committed prior to capture.[60] It is worth noting, however, that the Court addressed the Geneva Convention claims directly, using its own terms to determine it did not apply to the petitioners' trials.[61] The Court's consideration of the enforceability of the Convention was limited to a footnote in *Eisentrager* stating that "responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers."[62]

This review of the United States Supreme Court's past humanitarian law cases shows that the Court has primarily engaged with customary humanitarian law. Most of these cases have involved the proper disposition of property or the scope of military authority. Only in its World War II cases did the Court encounter conventional humanitarian

52. *See In re* Yamashita, 327 U.S. 1 (1946).
53. *See* Johnson v. Eisentrager, 339 U.S. 763 (1950).
54. *See id.*; *Yamashita*, 327 U.S. 1.
55. *See Yamashita*, 327 U.S. at 15-16; *Eisentrager*, 339 U.S. at 787-88.
56. *See* Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 118 L.N.T.S 343.
57. *See id.* at arts. 60, 63.
58. *See id.* at art. 60.
59. *Id.* at art. 63.
60. *See Yamashita*, 327 U.S. at 20-24; *Eisentrager*, 339 U.S. at 789-90.
62 *See Yamashita*, 327 U.S. at 37; *Eisentrager*, 339 U.S. at 789.
62. *Eisentrager*, 339 U.S. at 789, n. 14.

law and claims of specific individual rights granted by treaty. However, neither the *Yamashita* nor *Eisentrager* Court directly analyzed whether the Geneva Convention of 1929 was self-executing.[63]

III. THE LIMITS OF DOMESTIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW

The American response to the terrorist acts of September 11, 2001, was far-reaching, resulting in a military campaign in Afghanistan and an even wider-ranging "war or terrorism" around the globe. One consequence of these actions was the detention of hundreds of people, many of whom vigorously protested their innocence, at a United States naval base in Cuba. In the words of one scholar, the decision to hold detainees at Guantánamo Bay was made "primarily on the calculation that the government could operate in a sphere of lawlessness there."[64]

Declassified documents show that lawyers for the United States government provided an opinion on access to American courts just before the transfer of detainees began.[65] In a December 28, 2001, memo, Justice Department lawyers concluded that federal courts did not have jurisdiction over Guantánamo Bay detainees.[66] Justice Department lawyers interpreted *Eisentrager* to hold that federal courts had no jurisdiction over persons outside the sovereignty of the United States.[67] Even though the 1903 lease agreement for Guantánamo Bay gave the United States "complete jurisdiction and control," the lawyers concluded that federal courts had no jurisdiction over detainees because the agreement reserved ultimate sovereignty to Cuba.[68]

The United States government's position was challenged by detainees via habeas corpus proceedings. In its 2004 opinion in *Rasul v.*

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63. *See generally Yamashita*, 327 U.S. 1; *Eisentrager*, 339 U.S. 763.

64. Gerald L. Neuman, *The Military Commissions Act and the Detainee Debacle: A Response*, 48 HARV. INT'L. L.J. ONLINE 33 (2007), *available at* http://www.harvardilj.org/attach.php?id=100.

65. *See* Memorandum from Patrick Philbin and John Yoo, Dep. Asst. Atty's Gen., U.S. Dep't of Justice, to William Haynes II, Gen. Counsel, Dep't of Defense, Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba 1 (Dec. 28, 2001) [hereinafter Memo of Dec. 28, 2001], *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/01.12.28.pdf.

66. *Id.*

67. *See id.* at 3. The *Eisentrager* Court's relevant finding was that the petitioners were never in sovereign territory of the United States that the scenes of their offense, capture, trial, and punishment were all beyond the territorial jurisdiction of any federal court. *See Eisentrager*, 339 U.S. at 778. The Department of Justice memo stated that there is no distinction between sovereignty and territorial jurisdiction, reasoning that the latter must be based on the former. *See* Memo of Dec. 28, 2001, *supra* note 65, at 3.

68. *See* Memo of Dec. 28, 2001 *supra* note 65, at 3. The Justice Department also asserted that no court was granted jurisdiction by statute. *Id.* at 5.

Bush,[69] the Supreme Court rejected the government's position, holding that non-citizen detainees at Guantánamo Bay were entitled to access to the civilian courts of the United States.[70] Subsequent legislation to deny detainees such access[71] was held by the Court to be unconstitutional in *Boumediene v. Bush*.[72]

Gaining access to American civilian courts, however, is a hollow victory if no meaningful procedural or substantive law exists. Although it granted detainees access to courts, the Court noted that its opinion "[did] not address the content of the law that governs petitioners' detention."[73] Instead, the Court observed that "[i]n considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches."[74]

The procedural and substantive law applicable to the Guantánamo Bay detainees was quite limited.[75] Many of the protections found in the United States Constitution do not extent to persons held outside of the country.[76] The Supreme Court had previously held that such fundamental constitutional guarantees as the right to a jury trial and the prohibition against warrantless searches should not be applied extraterritorially.[77] Based on such precedents, a military commission

69. *See* Rasul v. Bush, 542 U.S. 466 (2004).

70. *See id.* at 552.

71. The Military Commissions Act of 2006 amended 28 U.S.C. §2241, governing the remedy of habeas corpus, to provide that:

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2635-36 (2006). The Act also established a system of military commissions to try enemy combatants. *See generally id.*

72. *See* Boumediene v. Bush, 128 S.Ct. 2229, 2274 (2008). The Court invalidated that portion of the Act purporting to strip federal courts of all jurisdiction to hear habeas corpus petitions from Guantánamo Bay detainees. *See id.* at 2270-72. The Court held that this provision violated the "Suspension Clause" of the constitution. *See id.* at 2274. The Suspension Clause provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

73. *Boumediene*, 128 S. Ct. at 2277.

74. *Id.* at 2276.

75. *See id.* at 2260-65.

76. *See id.* at 2259.

77. *See* Dorr v. United States, 195 U.S. 138 149 (1904) (finding that an American citizen in the Philippine Islands, then in U.S. possession, was not entitled to a jury trial); United States v. Verdugo-Urquidez, 494 U.S. 259, 274 (1990) (holding that the Fourth Amendment was not applicable to the search of a Mexican citizen being tried in U.S. courts when the search occurred in Mexico).

ruled in the case of one detainee that the right against self-incrimination found in the Fifth Amendment of the constitution does not apply extraterritorially.[78] The *Hamdan* ruling serves as a reminder that despite relying on the U.S. Constitution to open the doors of the courtroom, the Supreme Court might not clothe everyone who enters with the full protection of the U.S. Constitution.

If limitations existed on constitutional rights, then it must be admitted that domestic statutory law provided even less protection to detainees. The procedural and substantive provisions of statutory law can be repealed and amended by Congress at any time.[79] Indeed, Congress demonstrated its willingness to enact laws altering the legal framework for Guantánamo Bay detainees through the Detainee Treatment Act of 2005[80] and the Military Commission Act of 2006.[81]

Numerous procedural and substantive provisions of international human rights law were arguably applicable to Guantánamo Bay detainees, including portions of the International Convention on Civil and Political Rights[82] and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[83] However, upon ratification of both instruments, the U.S. Senate declared that the substantive articles "are not self-executing."[84] Under the doctrine of non-self-execution,[85] this expression of legislative intent renders a treaty judicially unenforceable in American courts.

It should be recognized that the doctrine of non-self-execution is controversial, even as a matter of domestic law. Moreover, as a party to a treaty, a nation is legally obligated to comply with its terms even if the treaty does not create enforceable rights at the local level.[86] However, without diminishing the legal obligation on the United States to comply

78. *See* United States v. Hamdan, No. D-029 & D-044, at 121 (Mil. Comm'n. Rep. July 20, 2008), *available at* http://www.nimj.org/documents/reporter_june%2019_i.pdf.

79. U.S. CONST. art. I, § 8.

80. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, 2739-2745 (2005).

81. Military Commission Act of 2006, 120 Stat. 2600.

82. International Convention on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

83. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

84. *See U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CONG. REC. S17486-01 (daily ed., Oct. 27, 1990) *available at* http://www1.umn.edu/humanrts/usdocs/tortres.html; *U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights*, 138 CONG. REC. S4781-01 (daily ed., April 2, 1992) *available at* http://www1.umn.edu/humanrts/usdocs/civilres.html.

85. For a discussion of the non-self-execution legal doctrine, *see supra* text accompanying notes 13-29.

86. *See* Gruber, *supra* note 20, at 1041.

with treaties to which it is a party, it is clear that the relevant provisions of international human rights law cannot be enforced by American courts upon individual petition. As a practical matter, therefore, international human rights law provided no meaningful protection under the domestic legal system.

Given these circumstances, the domestic law of the United States offered little in terms of a guaranteed legal framework for the detainees. Uncertainty existed as to the availability of constitutional rights. Statutory law was amended by Congress to allow questionable practices such as the admission of hearsay in military commission trials.[87] Moreover, the relevant international human rights law was not judicially enforceable in United States courts under the non-self execution doctrine.[88]

Against the backdrop of this legal vacuum, the United States Supreme Court encountered a version of international humanitarian law that evolved in important ways since the World War II era. The body of humanitarian law had been enlarged and enhanced by the adoption of the four Geneva Conventions of 1949.[89] As one commentator noted, the last century saw a "universal recognition that the protection of human dignity is a proper concern of international law."[90] This was reflected in the shift from the language of state obligations and prohibitions to a more rights-based language.[91] How, then, has the Court applied this enhanced body of law to the Guantánamo Bay detainee cases?

IV. APPLICATION OF THE LAW OF WAR IN THE DETAINEE CASES

After detentions at Guantánamo Bay began in 2002, numerous legal challenges were filed by or on behalf of detainees. The United States Supreme Court decided five cases dealing with detainee rights.[92] Two of

87. Military Commissions Act of 2006, 120 Stat. at 2608-09.

88. *See supra* text accompanying notes 82-85.

89. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

90. John Cerone, *Misplaced Reliance on the "Law of War,"* 14 NEW ENG. J. INT'L & COMP. L. 57, 70 (2007).

91. *See id.* at 71.

92. *See Boumediene,* 128 S. Ct. at 2229; Hamdan v. Rumsfeld, 548 U.S. 557 (2006); *Rasul,* 542 U.S. at 466; Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004).

these cases involved claims based on provisions of the Third Geneva Convention.[93]

Hamdi v. Rumsfeld involved an American citizen captured in Afghanistan who was alleged to have fought for the Taliban.[94] Yaser Hamdi was transferred to Guantánamo Bay and instituted habeas corpus proceedings.[95] Among other claims, he asserted that his detention was unlawful under Article 5 of the Third Geneva Convention.[96]

Article 5 of the Third Geneva Convention, which requires a determination by a "competent tribunal" when a person's status as a prisoner of war is in doubt,[97] had been rejected by the Court of Appeals for the Fourth Circuit on the basis that the Convention was not self-executing.[98] In its opinion, the Supreme Court plurality held that Hamdi was entitled to a hearing, but it did not reach the Article 5 claim.[99] Instead, the Court based its decision on constitutional grounds.[100]

The plurality did consider international humanitarian law, but in an indirect manner.[101] The Court cited the Third Geneva Convention as authority for the principle that "detention may last no longer than active hostilities" before determining that active combat was ongoing.[102] The Court also cited *Ex parte Quirin* in its recognition of the category "enemy combatants" as belligerents who fail to comply with the law of war.[103]

The *Hamdi* Court did not, however, apply international humanitarian law to determine whether Hamdi had, in fact, violated that law.[104] Nor did it provide any real analysis of the relationship between international law and domestic law.[105] One analysis of the opinion laments the missed opportunity "[i]nstead of confronting international humanitarian law, with all its limitations, the Supreme Court appears in *Hamdi* to have embarked on a questionable path toward creating its own, new constitutional common law of war, ungrounded either in

93. *See Hamdan*, 548 U.S. at 557; *see also Hamdi*, 542 U.S. at 507.
94. *See Hamdi*, 542 U.S. at 510.
95. *Id.* at 510-11.
96. *See id.* at 515.
97. Third Geneva Convention, *supra* note 89, at art. 5.
98. *See* Hamdi v. Rumsfeld, 316 F.3d 450, 468-69 (4th Cir. 2003).
99. *See generally Hamdi*, 542 U.S. 507.
100. *See generally id.*
101. *See generally id.*
102. *Id.* at 520. However, in his dissent, Justice Scalia rejects "reference to a treaty and certainly not to a treaty that does not apply." *Id.* at 588. He opines that the courts are bound by the political branches' determination of when hostilities end, and that the power to detain does not end at that point in any event. *Id.*
103. *See id.* at 519.
104. *See generally Hamdi*, 542 U.S. 507.
105. *See generally id.*

international humanitarian law or in any specific legislation enacted by the U.S. Congress."[106]

The Court addressed international humanitarian law again in *Hamdan v. Rumsfeld*.[107] Like Hamdi, Salim Hamdan was captured in Afghanistan and transferred to Guantánamo Bay.[108] Hamdan, a Yemini national, challenged his pending trial by military commission on two grounds.[109] First, he argued that the crime with which he was charged, conspiracy, was not a violation of the law of war.[110] Second, he alleged that the military commission procedures violated military and international law.[111]

The United States District Court for the District of Colombia agreed with Hamdan, holding that he could only be tried by military commission under the law of war and was therefore entitled to the protections of the Third Geneva Convention.[112] The United States District Court for the District of Colombia further held that the procedures employed by the military commission convened to try Hamdan violated both the Uniform Code of Military Justice and the Third Geneva Convention.[113] The government appealed, and the Court of Appeals for the District of Columbia reversed on the grounds that the Geneva Conventions were not self-executing and therefore unenforceable, and that the military commission's procedure conformed to military law.[114]

The Supreme Court's analysis of the validity of the military commission began with a review of the historical use of military commissions and the statutes alleged to support its use now.[115] Because Congress had not specifically authorized the establishment of military commissions, the Court had to determine whether the convening of a military commission to try Hamdan was justified by the "Constitution and laws, including the law of war."[116] Specifically, the Court examined whether the commissions complied with the Uniform Code of Military

106. David Coron & Jenny Martinez, *International Decision: Availability of U.S. Court to Review Decision to Hold U.S. Citizens as Enemy Combatants—Executive Power in War on Terror*, 98 AM. J. INT'L L. 782, 787 (2004).

107. *See generally Hamdan*, 548 U.S. 557.

108. *See id.* at 566.

109. *See id.* at 567.

110. *See id.*

111. *See id.*

112. *See* Hamdan v. Rumsfeld, 344 F.Supp.2d 152, 173 (D.D.C. 2004).

113. *See id.*

114. *See* Hamdan v. Rumsfeld, 415 F.3d 33, 43-44 (D.C. Cir. 2005).

115. The Court first disposed of the government's arguments that Hamdan's petition was foreclosed by the Detainee Treatment Act of 2005 and that the Court should abstain from deciding the case until completion of the military commission proceedings. *See Hamdan*, 548 U.S. at 572-91.

116. *Id.* at 595.

Justice, which conditioned the use of military commissions on compliance with its own provisions and with international law, including the Geneva Conventions of 1949.[117]

The Court described the structure of the military commission, observing with concern that the accused and civilian defense lawyers could be excluded from, and precluded from learning what evidence was presented in, any part of the proceeding deemed "closed" by the presiding officer.[118] In addition, the commission rules permitted the admission of any probative evidence, including hearsay and evidence obtained through coercion.[119] Finally, the appeal from a conviction by a commission could be limited to review by a three-member panel, only one member of which needed experience as a judge, with the final determinations made by the Secretary of Defense and President.[120]

The Court then analyzed the military commission under domestic military law as codified in the Uniform Code of Military Justice.[121] The Court pointed out that Article 36 of the Code places two relevant restrictions on the President's power to make establish military commissions.[122] First, the procedure must "apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with" the Code itself.[123] Second, the Code requires that regulations for courts-martial, military commissions, and other tribunals must be "uniform insofar as practicable."[124] With a particular emphasis on the rule allowing exclusion of the accused from commission proceedings, the Court held that the military commissions violated this article of the Code.[125]

Although it had already invalidated the military commission under domestic military law, the Court nonetheless turned to Hamdan's Geneva Convention argument.[126] The Supreme Court acknowledged the Court of Appeals conclusion that the Convention was not enforceable,[127] but declared that conclusion irrelevant.[128] There was no need to address judicial enforceability of the Convention because Article 21 of the

117. *See id.* at 613.
118. *See id.* at 614.
119. *See id.*
120. *See Hamdan,* 548 U.S. at 615.
121. *See id.* at 613-25.
122. *See id.* at 620.
123. *Id.* (quoting 10 U.S.C. § 836).
124. *Id.*
125. *See Hamdan,* 548 U.S. at 624.
126. *See id.* at 625-35.
127. *See id.* at 626-27.
128. *See id.*

Uniform Code of Military Justice specified that the statutory creation of courts-martial did not deprive the jurisdiction of military commissions under the law of war.[129] The Court held that the "law of war" included the Convention, and was applicable to Hamdan through its incorporation into Article 21.[130]

The Court declined to examine whether Hamdan was subject to the full protection of the Third Geneva Convention due to the existence of an armed conflict of an international character.[131] Instead, the Court found that even if Hamdan was not entitled to full protection, he was still covered by Common Article 3 of the Geneva Conventions.[132] Article 3 provides minimal standards of conduct even to armed conflict not involving parties to the convention[133] and is applicable to detained members of armed forces.[134] Among other provisions, Article 3 prohibits the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[135] Applying this provision of Common Article 3, the Court found that the military commission established to try Hamdan was not a "regularly constituted" court, and that no practical need justified deviation from the use of courts-martial, which it considered the regular military courts in the American system.[136]

While *Hamdan* represented a victory for the rule of law in the Guantánamo Bay detainee cases, it may not represent a true victory for international humanitarian law. The Court did not hold that the Third

129. *See id.* at 627-28; Uniform Code of Military Justice, 10 U.S.C. § 821, art. 21 (2005).

130. *Hamdan*, 548 U.S. at 627-28.

131. *See id.* at 628-29. The Court of Appeals had held, in the alternative that since Hamdan was captured in the conflict with al Qaeda the Convention was not triggered. *Id.*

132. *See id.* at 629-30.

133. Under Article 2, the full Convention applies to "two or more of the High Contracting Parties," while Common Article 3 applies to "armed conflict not of an international character." *See* Third Geneva Convention, *supra* note x at arts. 2 & 3. The government argued that while Article 2 could not apply because al Qaeda was not a party to the Convention, neither could Article 3 because the fight against al Qaeda *was* of an international character. *See Hamdan*, 548 U.S. at 736. This argument was accepted by the Court of Appeals as an alternate basis for its decision. *See Hamdan*, 415 F.3d at 41. The Supreme Court rejected this argument, relying in part on the Commentary to the Third Geneva Convention to find that Article 3 was written in a broad manner and in contradistinction from Article 2. *See Hamdan*, 548 U.S. at 630-31.

134. *See* Third Geneva Convention, *supra* note 89, at art. 3.

135. *Id.* at art. 3(1)(d).

136. *Hamdan*, 548 U.S. at 631-33. The opinion by Justice Stevens goes on to consider whether the military commissions afforded "all the judicial guarantees" recognized by civilize people. *Id.* at 629. However, because Justice Kennedy did not join in this part it did not represent the opinion of the court. *See id.* at 633-35.

Geneva Convention was judicially enforceable of its own accord.[137] By applying the Convention via incorporation through a domestic statute, the Court invited legislative action to foreclose this possibility in the future.[138]

At the same time, *Hamdan* did rely on international humanitarian law, albeit in a circuitous manner, to vindicate individual rights.[139] The Court's failure to find the Convention self-executing and judicially enforceable might be understood as an exercise of judicial restraint. It is possible that future events may eventually force the Court to address this issue in a direct manner.

V. THE CURRENT STATUS

Partially in response to the United States Supreme Court's decision in *Hamdan*, the U.S. Congress passed the Military Commissions Act of 2006.[140] This legislation contained a broad spectrum of measures requested by the Bush Administration.[141] At its centerpiece, the Act authorized the establishment of military commissions by the President to try "alien unlawful enemy combatants"[142] and provided regulations for their operation.[143] The Act also purported to strip federal courts of jurisdiction to hear habeas corpus petitions brought on behalf of enemy combatants.[144]

Following passage of the Military Commissions Act, numerous organizations across the ideological spectrum called on Congress to repeal the Act in its entirety.[145] In 2008, the United States Supreme

137. *See id.* at 635.

138. *See id.*

139. *See id.* at 613-35.

140. *See* Military Commissions Act of 2006, 120 Stat. at 2608-09.

141. *See* Charles Babington & Jonathan Weisman, *Senate Approves Detainee Bill Backed by Bush*, WASH. POST, Sept. 26, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/09/28/AR2006092800824.html.

142. *See* Military Commissions Act of 2006, 120 Stat. at 2602.

143. *See id.*

144. *See id.* at 2635.

145. Groups such as Human Rights First, The John Birch Society, Amnesty International, and the American Civil Liberties Union all criticized the Military Commissions Act and advocated for its repeal. *See* HUMAN RIGHTS FIRST, HOW TO CLOSE GUANTÁNAMO 9 (Nov. 2008), *available at* http://www.humanrightsfirst.org/pdf/080818-USLS-gitmo-blueprint.pdf; The John Birch Society; New Bill to Repeal Military Commissions Act in House, http://www.jbs.org/index.php/jbs-news-feed/1172-new-bill-to-repeal-military-commissions-act-in-hous, (last visited Sep. 20, 2009); AMNESTY INTERNATIONAL JUSTICE DELAYED AND JUSTICE DENIED? AMR 51/044/2007(2007), *available at* http://www.amnesty.org/en/library/asset/AMR51/044/2007/en/dom-AMR510442007en.pdf; ACLU Launches Constitution Voter Campaign To Restore Lost Liberties In '08, http://www.aclu.org/safefree/general/36810prs20080917.html. In late 2007, legislation was introduced to repeal the Military Commission Act in its entirety. American Freedom Agenda Act of 2007, H.R. 3835, 110th Cong. (2007), *available at*

Court found unconstitutional the provision of the Act stripping federal courts of the power to grant habeas corpus review to detainees in *Boumediene v. Bush*.[146] On January 20, 2009, newly-elected President Barack Obama suspended prosecutions before military commissions pursuant to the Act[147] and issued an executive order to close the Guantánamo Bay facility.[148]

Despite these developments, however, the majority of the Military Commissions Act remains in force. One of the most troubling surviving provisions is broadly directed at the use of the Geneva Conventions. It reads:

> No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.[149]

This provision is not limited to enemy combatants or Guantánamo Bay detainees. Instead, it purports to any prohibit individuals from relying on the Geneva Conventions in all civil cases and habeas corpus proceedings involving the government. It is important to note, however, that this provision does ban a person from invoking the Geneva Conventions in

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http://www.govtrack.us/congress/billtext.xpd?bill=h110-3835. This bill, introduced by Representative Ron Paul, a Texas Republican, was referred to the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties. *See id.* The stated purpose of the bill was to "restore the Constitution's checks and balances and protections against government abuses as envisioned by the Founding Fathers." *Id.* at § 2(b). No meaningful action was taken on the bill. *See generally id.*

146. *See Boumediene*, 128 S.Ct. at 2274.

147. *See* Peter Finn, *Obama Seeks Halt to Legal Proceedings at Guantánamo*, WASH. POST, Jan. 21, 2009, at A2.

148. Executive Order—Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 27, 2009), *available at* http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities/ [hereinafter Executive Order Guantánamo Bay Closure]. The order called for closure of the facility "as soon as practicable, and no later than 1 year from the date of this order." *Id.* As of late September 2009, Guantánamo Bay was still being used as a detention facility, although the Justice Department announced that some former detainees were being transferred to other countries. U.S. DEPT. OF JUSTICE, UNITED STATES TRANSFERS THREE GUANTÁNAMO BAY DETAINEES TO FOREIGN NATIONS, Sept. 26, 2009, *available at* http://www.usdojwhitehouse.gov/opa/pr/2009/September/09-ag-1035.html. In a September 27, 2009, interview, Defense Secretary Robert Gates acknowledged that it was "going to be tough" to meet the January 22, 2010, deadline for closure set by the executive order. *This Week* (ABC television broadcast Sept. 27, 2009) *available at* http://blogs.abcnews.com/george/2009/09/gates-on-closing-gitmo-its-going-to-take-a-little-longer.html.

149. Military Commissions Act of 2006, 120 Stat. at 2631.

federal criminal proceedings, which the Obama Administration has considered as an alternative venue to military commissions.[150]

A related provision in the Military Commissions Act does apply to criminal prosecutions if they occur before military commissions.[151] This narrower restriction states that "no alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."[152] While military commission trials have been suspended by President Obama since taking office, it appears that the administration may yet resume prosecutions before restructured military commissions,[153] thereby implicating this provision.

These provisions have the potential to significantly impact the use of the Geneva Conventions by American courts while they remain in force. Salim Hamdan's success before the Supreme Court was a product of his reliance on rights conveyed by the Conventions.[154] There can be no doubt that the Congressional intent was to statutorily undo the basis for Hamdan's legal victory.[155]

It should be acknowledged that the validity of these provisions is not certain. Scholars have argued that as long as the United States is a party to the Geneva Conventions, legislative attempts to restrict its enforceability under domestic law may be limited by the Supremacy Clause of the Constitution and the nature of the treaty.[156] Moreover, it should be considered that the guarantees relied on in *Hamdan* may be available via customary humanitarian law even if reliance on the Geneva Conventions is limited by the Act. As demonstrated, the United States Supreme Court has a long history of applying and enforcing customary humanitarian law.[157] Although these cases have not involved the

150. *See* Finn, *supra* note 147.

151. *See generally* Military Commissions Act of 2006, 120 Stat. at 2602.

152. *Id.* at 2602.

153. President Obama announced a 120-day suspension of the trials upon taking office. *See* Finn, *supra* note 147. Trials were again suspended in May 2009 at the request of the government. *See* Christian Ehret, *Military Judge Grants Government Motion to Delay Guantanamo Case*, JURIST, May 20, 2009, *available at* http://jurist.law.pitt.edu/paperchase/2009/05/military-judge-grants-government-motion.php. On September 21, 2009, prosecutors requested another two-month delay to allow Attorney General Eric Holder time to decide whether the government will proceed with military or civilian criminal trials. *See* Carol Rosenberg, *Guantánamo Judge Delays 9/11 Case Until Nov. 16*, MIAMI HERALD, Sept. 22, 2009, *available at* http://www.miamiherald.com/news/americas/guantanamo/story/1245120.html.

154. *See Hamdan*, 548 U.S. at 613.

155. *See id.* at 710-11.

156. *See* Carlos Manuel Vazquez, *Military Commissions Act of 2006: The Military Commissions Act, The Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 73, 88-94 (2007).

157. *See supra,* Part II.

assertion of individual rights, the Court has recognized that it can find a cause of action based in specific and universal norms of international law.[158]

It is widely accepted that Common Article 3 of the Geneva Conventions is declaratory of customary international law.[159] As discussed above, Article 3 provides important minimum standards for military trials of any kind.[160] These include judgment by "a regularly constituted court" and the availability of "all the judicial guarantees which are recognized as indispensable by civilized peoples."[161] Although these standards are set forth in the Conventions, they are also a part of customary humanitarian law. Therefore, they are arguably a part of American law even if reliance on the Conventions is prohibited by legislation.

It is, of course, possible that the remaining sections of the Military Commissions Act will still be repealed or amended through the political process. During his inaugural address, President Obama reiterated the fundamental role of the rule of law and international cooperation.[162] This presumably includes fulfilling the American obligation to "respect and to ensure respect for[163] the Geneva Conventions[164] However, repeal of the remaining provisions of the Act may be less of a priority now that plans have been announced to close the Guantánamo Bay detention facility.[165]

CONCLUSION

The United States Supreme Court has long recognized the law of war as a part of international law.[166] During this long history only a handful of the Court's cases have involved individual rights conferred by

158. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732-33 (2004).

159. *See* Prosecutor v. Fofana, Case No. SCSL-04-14-PT-101, Decision on Motion on Lack of Jurisdiction ¶ 24 (May 25, 2004); Prosecutor v. Hadzihasanovic, Case No. IT-01-47, Decision on Command Responsibility, ¶ 13 (July 16, 2003); Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defense Motion on Jurisdiction, ¶ 72 (Aug. 10, 1995); Nicaragua v. United States, 1986 I.C.J. 14, 114 (Common Article 3 rules represent "elementary considerations of humanity"). *See also* Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT'L L. 817, 831 (2005); Jordan Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 816 (2005).

160. *See supra* text accompanying notes 131-36.

161. *See supra* Part IV.

162. *See* President Barack Obama, Inaugural Address (Jan. 20, 2009) *available at* http://www.whitehouse.gov/blog/inaugural-address/ [hereinafter Obama Inaugural Address].

163. *See* Third Geneva Convention, *supra* note 89, at art. 1.

164. *See generally* Obama Inaugural Address, *supra* note 162. *See, e.g.*, Third Geneva Convention, *supra* note 89, at art. 1.

165. *See* Executive Order Guantánamo Bay Closure, *supra* note 148.

166. *See supra* Parts II-III.

humanitarian law.[167] In the most recent of these cases, the Court relied on conventional humanitarian law to invalidate the convening of a military commission at Guantánamo Bay.[168] The Court did not, however, directly address the relationship between international humanitarian law and domestic law, nor did it definitively state whether the Geneva Conventions are judicially enforceable.[169]

The Military Commissions Act of 2006 subsequently foreclosed reliance on the Geneva Conventions in American courts. While the suspension of prosecutions before military commissions has made this issue less pressing, the relevant provisions remain in force, damaging American credibility and presenting a real obstacle in the event that reliance on the Geneva Conventions becomes necessary in the assertion of individual rights in American courts. While the constitutionality of these provisions will likely be challenged if future prosecutions occur, the repeal of the Military Commission Act would render this a moot point.

167. *See supra* Parts II-III.
168. *See generally Hamdan*, 548 U.S. 557.
169. *See generally id.*